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September 19, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 – 12th Street S.W.
Washington, D.C. 20554

Subject: In the Matter of Payphone Access Line Rates
CC Docket No. 96-128

Dear Ms. Dortch:

This firm represents the Northwest Public Communications Council (“NPCC”), an association of payphone service providers in the Northwest. NPCC submits this letter to point out several important facts that distinguish its claim against Qwest under the New Services Test (“NST”) that is pending before the Oregon PUC (“OPUC”) from all of the petitions for refunds under the NST that are currently pending in CC Docket No. 96-128.¹ From a procedural perspective, Oregon is: (1) somewhat different from the other Qwest states, because Qwest’s Public Access Line (“PAL”) rates were under review on and before May 19, 1997, due to a pending rate case; and (2) significantly different from the other RBOC’s states because there is no request that this Commission overturn the OPUC or an Oregon Court decision—the refund case is still pending and the OPUC is awaiting FCC guidance. Moreover, Qwest’s “pre-existing” PAL rates (as of April 15, 1997) were rejected by the Oregon Court of Appeals in 2004 in what is now a final and unappealable order.²

Because the OPUC case is significantly different from the other RBOC’s states, defenses the other RBOCs have raised to refund claims cannot apply to Oregon.³ Specifically: (1) the doctrine of laches cannot bar the NPCC’s claims because NPCC has been involved in continuous litigation with Qwest over its payphone rates since 1996 before the OPUC, (2) NPCC

¹ See *Infra* at n. 5.

² See *Infra* at p. 3.

³ The NPCC certainly does not concede that such defenses have any merit. NPCC simply wishes to note the distinctions that make application of the defenses in Oregon impossible.

Marlene H. Dortch
September 19, 2006
Page 2

did not file an FCC complaint with this Commission because it was already trying to get Qwest to comply with the NST in the OPUC rate case, and (3) res judicata does not bar the NPCC's claims because there is no OPUC order holding that NPCC's refund claim is foreclosed. To the contrary, the NPCC's refund case is still pending before the OPUC, and the OPUC has actively sought this Commission's guidance on refunds.⁴

1. Background

NPCC is filing this ex parte letter because it recently learned that Commission Staff asked American Public Communications Council's ("APCC") counsel Bob Aldrich whether the pending petitions of five payphone associations ("Associations"⁵) in CC Docket No. 96-128 are barred by laches or res judicata and why the Associations did not file a complaint with this Commission. The Associations' petitions seek refunds from RBOCs under the Commission's New Services Test ("NST") and related orders ("Payphone Orders") in CC Docket No. 96-128.

The Commission Staff's questions involve issues similar to those raised in a pending OPUC proceeding, discussed below, in which NPCC seeks a refund for its members from Qwest for payphone services overcharges under the NST and the Payphone Orders. NPCC believes that the Commission Staff should know the answers to these questions as they relate to NPCC, because, as explained below, the OPUC has asked this Commission to clarify the NST so that the OPUC can enter a ruling that is consistent with federal law.

2. NPCC's claim is not barred by laches because NPCC has been challenging Qwest's payphone rates before the OPUC since 1996.

The NPCC has diligently pursued its NST claims against Qwest *for ten years*. In 1995, the OPUC opened a docket to examine all of Qwest's rates, including its payphone rates. *See* OPUC Docket No. UT-125 ("*Oregon Rate Case*"). NPCC intervened in that docket on September 13, 1996. During the course of the *Oregon Rate Case*, NPCC filed numerous briefs alleging that Qwest was charging NPCC's members rates that exceeded NST-allowable amounts and participated in a hearing in which NPCC's witness testified to that fact.

The OPUC issued orders in 2001 and 2002 ruling against NPCC, in part. Although the OPUC lowered Qwest's PAL rates considerably from the "pre-existing" 1997 rates, the OPUC did not bring Qwest's rates fully into compliance with the NST. *See* OPUC Order No. 01-810, Docket UT-25/Phase II (Sept. 14, 2001) and Order No. 02-009, Docket

⁴ *See Infra* at p. 3.

⁵ The Associations include the Independent Payphone Association of New York, the New England Public Communications Council, Southern Public Telecommunications Association, the Florida Pay Telephone Association, and the Indiana Pay Telephone Association.

Marlene H. Dortch
September 19, 2006
Page 3

UT-125/Phase II (Jan. 8, 2002). The NPCC appealed these orders because the OPUC's analysis was inconsistent with the NST.

The NPCC won the *Oregon Rate Case* on appeal. The Oregon Court of Appeals on November 10, 2004 issued an order ruling that the OPUC did not properly apply the NST. *Northwest Public Comm's Council v. PUC*, 100 P.3d 776 (2004). The Court remanded the case to the OPUC for a final determination of how Qwest should comply with the NST, specifically noting that "[t]he PUC must reconsider its order in light of the New Services Order and other relevant FCC orders." *Id.* at 779. The *Oregon Rate Case* is still on remand, with the OPUC having very recently denied Qwest's request to offset PAL rate decreases with increases in other rates.

The NPCC is also pursuing another action before the OPUC that is closely related to the *Oregon Rate Case*. Specifically, NPCC filed a separate complaint on May 14, 2001 with the OPUC ("*Oregon Refund Case*") seeking refunds for Qwest's violation of the NST.⁶ NPCC asked that the refunds in the *Oregon Refund Case* be determined by the rate set in the *Oregon Rate Case*. The *Refund Case* was placed on hold pending the outcome of the *Oregon Rate Case*.

After the Court of Appeals reversed the OPUC's order in the *Oregon Rate Case*, the NPCC sought summary judgment in the *Refund Case* on Qwest's liability for refunds. However, the OPUC decided to stay the *Refund Case* pending this Commission's ruling in Docket 96-128. *See* Ruling, Disposition: Proceeding Held In Abeyance, OPUC Docket No. DR 26/UC 600 (March 23, 2005); *See* Order, Disposition: ALJ Ruling Affirmed, Order No. 05-208, OPUC Docket No. DR 26/UC 600 (May 3, 2005). The OPUC then sent a letter to this Commission requesting "prompt Commission action in CC Docket 96-128" that would "allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*)." *Letter of Oregon Public Utility Commissioner Lee Beyer to FCC Chairman Kevin Martin* (Nov. 23, 2005). (*See Attached*).

The NPCC's situation is thus different from that of the other Associations that have pending NST petitions with the Commission. Although the NPCC and the Associations are all victims of RBOC failure to comply with the NST, the other Associations are appealing the adverse decisions of state utility commissions. NPCC has no adverse commission decision, and the both cases are still pending.

⁶ The refund complaint was timed to be filed within two years of the first reduction in Qwest's "pre-existing" 1997 PAL rates. Although Qwest first lowered PAL rates in 1999 in the *Oregon Rate Case*, it did not pay refunds to NPCC members pursuant to the Commission's *Waiver Order*.

Marlene H. Dortch
September 19, 2006
Page 4

NPCC's case is, however, similar to the other Association petitions because it is beyond reasonable dispute that Qwest overcharged the NPCC's members during this period. After the release of this Commission's New Services Order⁷ in 2002 in CC Docket No. 96-128, Qwest belatedly dropped its Oregon PAL rates. While the OPUC has yet to approve a legal public access line ("PAL") rate for Qwest as complying with the NST—nearly ten years after Qwest was supposed to have complied with it—indications are that Qwest overcharged PSPs for PAL service by between \$20 and \$50 per line per month from April 15, 1997 through March 2003. For example, in 1997, Qwest charged up to \$60 per month or more⁸ for PAL service. For most of 1998 to 2003, Qwest charged about \$30 for PAL service. Earlier this year, on remand from the Court of Appeals, Qwest proposed to slash its Oregon PAL rate to under \$10, alleging that the new rate complied with the NST. Thus, for seven years Qwest charged PSPs three times to six times the rate it should have been charging under the NST.

3. NPCC did not file a complaint with the FCC because it had a pending complaint with the OPUC.

NPCC did not need to file a complaint with this Commission because it was already participating in the *Oregon Rate Case* and *Oregon Refund Case* before the OPUC, starting in 1996. Thus a Commission complaint would have been duplicative. Despite the fact that NPCC filed no complaint with the Commission, the NPCC participated actively in CC Docket No. 96-126 by filing three sets of comments and engaging in multiple meetings with various Commission Staff.

4. Res judicata bars many Qwest claims but not NPCC claims.

The NPCC's NST cases are not barred by res judicata, as there is no OPUC order holding that refunds are or are not due. Further, as a result of the Court of Appeals' reversal, there is no valid Oregon order holding that Qwest's rates meet the NST or that Qwest complied with the NST.

In contrast, many Qwest's defenses to the NPCC's NST case are subject to res judicata established by the following findings of the Court of Appeals of Oregon:

- The Commission's Payphone Orders in CC Docket No. 96-128, specifically including the 2002 New Services Order, are binding on the OPUC (and thus Qwest) under the "preemptive effect of Section 276." *NPCC*, 100 P.3d at 778.

⁷ Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("New Services Order").

⁸ Until late 1997, Qwest imposed mandatory measured service on PSPs in Oregon with exorbitant usage charges, meaning that there was almost no upward limit to the PAL rate.

Marlene H. Dortch
September 19, 2006
Page 5

- The OPUC did not correctly apply the NST to Qwest's rates. *Id.*
- The OPUC's (and Qwest's) use of traditional "rate of return" ratemaking violated the NST. *Id.* at 777-779.

The OPUC must now scrutinize Qwest's PAL rates using the NST and the Payphone Orders rather than traditional rate of return principals. Since Qwest's PAL rates were set under a rate of return model, there is no doubt that the OPUC will find them to be above the NST-allowable level and subject to refunds.

We hope this letter answers the Commission Staff's inquiries. Please contact me if you have any other questions.

Sincerely,


Brooks E. Harlow

cc: w. enc: Ms. Pamela Arluk (via e-mail)
Ms. Amy Bender (via e-mail)
Ms. Lynne Engledow (via e-mail)
Ms. Diane Griffin Holland (via e-mail)
Mr. Christopher Killion (via e-mail)
Mr. Marcus Maher (via e-mail)
Ms. Tamara Priess (via e-mail)
Ms. Paula Silberthau (via e-mail)

Marlene H. Dortch
September 19, 2006
Page 6

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Attachment

Letter of Oregon Public Utility Commissioner Lee Beyer to FCC Chairman Kevin Martin
(Nov. 23, 2005)



Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission

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November 23, 2005

Chairman Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: CC docket 96-128

Dear Chairman Martin:

We are writing to request prompt Commission action in CC Docket 96-128, the Consolidation Petition proceeding. Commission action in the docket would allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*).

This letter is prompted by a specific issue we are addressing. Specifically, we must determine whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" established in the Commission's *Payphone Orders*. This determination has been mandated by the Oregon Courts.

The Oregon Commission could, of course, interpret Order DA 97-885 in an order. If we were to do so, however, we are certain that either Qwest or the PSPs would appeal our decision. This would likely lead to several years of litigation concerning issues that can best be resolved by your Commission. The only way to avoid such a scenario would be for the Commission itself to interpret the *Waiver Order*. That is why we are requesting that the Commission act as expeditiously as possible in CC Docket 96-128.

Thank you for your consideration.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

cc: Brooks Harlow, Miller Nash
Don Mason, Qwest